OGC 75-2632

21 July 1975

MEMORANDUM FOR: Deputy Director for Administration

SUBJECT   : Classification of Information in the Public Domain

1. At a recent IRC Meeting we were requested to comment on the matter of information in the public domain, in particular, the question as to the application of the classification requirements to information which is in the public domain.

2. Executive Order 11652 requires agencies and authorized employees of agencies to classify and protect information the disclosure of which would damage national security. There are provisions regulating the declassification of information, including requirements for automatic declassification. The order does not directly address the question of information in the public domain.

3. Manifestly information no longer warrants classification and can no longer be protected when it is no longer a secret. The controlling question in such situation could be stated: what is the information which is in the public domain? The news coverage of the [_____] incident, for example, was so extensive that the public certainly has no doubt that CIA was engaged in that operation. Notwithstanding this certainty in the public mind, no government statement or acknowledgement has been made officially and publicly that CIA or the government engaged in that activity. The fact of government participation in the [_____] if it did so, therefore is not in the public domain.
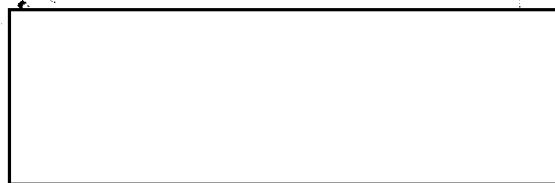
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4. The law in this area is well stated by the court of appeals in the recent Marchetti case (Knopf v. Colby) as follows: "The District Judge properly held that classified information obtained by the CIA or the State Department was not in the public domain unless there had been official disclosure of it. Rumor and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." The court also noted that proper authorities may conclude

that information, though never officially announced or enunciated, has "so far entered the public domain that it should be declassified." But, the court concluded, as long as it remains classified . . ., there should be no further judicial inquiry." It would follow that information concerning matters which are well known or are widely believed to be government activities or government-associated may and should be classified where disclosure by the government would tend to verify government association and where the fact of government association is information the disclosure of which would damage national security.

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Associate General Counsel

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